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IN THE

Supreme Court of the United States

October Term, 1975
Nos. 75-567 & 75-577
(Consolidated)

STATE OF OREGON, Acting by and through the State Land Board, *Petitioner and Respondent,*

vs.

CORVALLIS SAND AND GRAVEL COMPANY, an Oregon corporation, *Respondent and Petitioner.*

On Writ of Certiorari to the Supreme Court of Oregon

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Interest of Amici Curiae

This case involves a controversy between the State of Oregon and a riparian landowner both claiming title to riverbed land lying beneath a wholly intrastate section of the Willamette River in Oregon. The land here in dispute does not lie on any interstate boundary. Nor does the record disclose that the riparian

landowner is claiming under a pre-statehood or post-statehood federal land patent. Both parties invoke the appellate jurisdiction of this Court to decide a federal question arising under the federal common law as explicated in *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313 (1973).

California and the other States which join with it on this brief contend that *Bonelli* did not present, nor does this case present, a federal question conferring jurisdiction upon this Court. Until *Bonelli* this Court had consistently recognized that within their respective boundaries, the States were the sovereign holders of absolute title to all lands lying beneath their navigable waterways and tidewaters. *Bonelli* cast a cloud upon this title by holding that a State's title to lands formerly beneath navigable waters could be diminished by the operation of federal common law. The present case threatens to extend the reach of federal common law even further since the Oregon courts have applied *Bonelli* to divest the State of its title to lands still submerged on the bed of the Willamette River. If federal common law controls this dispute, California and its sister States are concerned that their once absolute ownership of the lands beneath their navigable waters and lakes and their tidewaters may be reduced to nothing more than a navigational servitude. If this case truly presents a federal question arising under the Equal-Footing Doctrine or the Submerged Lands Act, then there may remain no case in which state law exclusively controls a dispute involving title to sovereign lands[1] lying wholly within the borders of

[1]The term "sovereign lands" as used in this brief denotes all lands lying beneath navigable waters and tidewaters within the borders of a State.

a single State. All of these local title disputes may have been transmuted into federal cases coming within both the original jurisdiction of the federal district courts and the appellate jurisdiction of this Court on certiorari. Whenever a State brings an action in ejectment or to quiet title to submerged, accreted, or relicted lands, the defendants may be able to remove the case to a federal district court pursuant to 28 U.S.C. §1441. Even in those cases where the litigation is filed in state court and remains there, state rules of property may be forced to yield to this Court's supervisory view of the federal common law.

California and the other States joining with it in this brief are seriously concerned that this litigation threatens to destroy our perfect Union of 50 sovereign States fully equal in the rights and prerogatives which they exercise within their respective borders. This Court's diminution of the title to sovereign lands held by States owing their sovereign existence to Acts of Congress can only result in abrogation of the Equal-Footing Doctrine. To paraphrase George Orwell, some States will be more equal than others. In *Coyle v. Smith*, 221 U.S. 559, 580 (1911), this Court stated:

> ". . . [T]he constitutional equality of the States is essential to the harmonious operation of the scheme upon which the Republic was organized. When that equality disappears we may remain a free people, but the Union will not be the Union of the Constitution."

It is to preserve the constitutional equality of the States essential to the "Union of the Constitution" that members of the Original Thirteen States join other States more recently admitted in urging this Court

to remove the cloud of federal common law which it has placed upon the sovereign title of the latter 37 States to the sovereign lands within their respective boundaries.

The sovereign lands of the States of the Union are considerable. Outside the Original Thirteen States,[2] there are 68,614 square miles of land covered by inland waters and 66,769 miles of tidal shoreline.[3] *Statistical Abstract of the United States, 1974,* 171-72. *Bonelli* suggests that, to some as yet undefined extent, the States admitted to the Union by acts of Congress may not be the absolute owners of the lands beneath their navigable waters and tidewaters. Instead, *Bonelli* intimates that long settled ownership rights of the States in these sovereign lands may be subject to defeasance unless the State can demonstrate that title to these lands is "necessary to any navigational or related purpose." *Bonelli Cattle Co. v. Arizona, supra,* 414 U.S. at 331. Until this Court limits the broad language of *Bonelli,* the States are faced with the prospect of a plethora of litigation challenging state title to sovereign lands.

Although the sovereign lands in question lie at the bottom of navigable lakes and rivers or are washed by the tides, their location does not in any way diminish their importance to the States which own them. Historically, ownership of these lands has been essential

[2]The sovereign lands of the Original Thirteen States are probably not affected by *Bonelli. See Bonelli Cattle Co. v. Arizona, supra,* 414 U.S. at 336 (dissenting opinion of Stewart, J.).

[3]It should be noted that not all States claim ownership of lands beneath inland navigable waters. In *Barney v. Keokuk,* 94 U.S. 324, 338 (1876), the Court recognized that States may choose "to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity . . . ."

to state interests in the protection of commerce, navigation and fishery. Mineral leases on these lands also produce valuable revenues for the public good. Many States like Oregon collect royalties for the removal of sand and gravel from their riverbeds. Oil and gas leases are also common. In California alone, these sovereign lands account for $147,000,000 annually in revenues from various types of mineral leases. These revenues finance California higher education, including the University of California and the state university system, and fund the California water project.

The suggestion in *Bonelli* that state title to sovereign lands is defeasible places a cloud on a host of private titles as well. As Mr. Justice Stewart noted in his *Bonelli* dissent, title to land patented by the State to private individuals can be no greater than the title held by the State as grantor. *Bonelli Cattle Co. v. Arizona, supra,* 414 U.S. at 332 n. 1. Many States have issued patents for abandoned riverbeds and tidelands. Does the very fact of a sale demonstrate lack of public purpose and hence defeasible title? If so, the cloud on private titles is one of staggering proportions. For example, California has issued over 472 tideland patents to private parties. More than 80,000 acres are included within the perimeter descriptions of these patents, and substantial portions of the business districts of San Francisco, Oakland, Long Beach, San Diego, San Raphael, and Eureka have been built on reclaimed lands within their patents. If *Bonelli* is susceptible of application to these private title cases as well, both state and federal courts may be inundated with litigation emanating from this source.

SUMMARY OF ARGUMENT

Certiorari was granted in this case to consider various questions arising under the federal common law as announced in *Bonelli Cattle Co. v. Arizona,* 414 U.S. 313 (1973). The States joining in this *amici curiae* brief contend that *Bonelli* should not be controlling precedent for decision of the intrastate title dispute involved in this case. There was no federal question conferring appellate jurisdiction on this Court in *Bonelli,* and the existence of a federal question was not challenged there. When a question of jurisdiction has not been contested in a prior case, the exercise of jurisdiction in such a case has normally not been deemed to be precedent in a subsequent case which finally brings jurisdictional issue before this Court. *Hagans v. Lavine,* 415 U.S. 528, 533-35 n. 5 (1974). Moreover, even if the question of jurisdiction had been raised and decided in *Bonelli, amici* would still urge this Court to reconsider that decision because *Bonelli* is such a significant departure from this Court's otherwise consistent recognition of state sovereignty over lands beneath navigable waters and tidewaters wholly within State borders.

This case does not raise, nor did *Bonelli* raise, a federal question arising under the Equal-Footing Doctrine or the Submerged Lands Act. The Equal-Footing Doctrine properly serves only to delimit the peripheries of state and national sovereignty by drawing boundary lines forbidding the intrusion of one into the exclusive province of the other. Until *Bonelli,* the Equal-Footing Doctrine served only this external purpose. *See Coyle v. Smith,* 221 U.S. 559 (1911); *United States v. Texas,* 339 U.S. 707 (1950). It had never been applied

to restrict a single State's exclusive jurisdiction over its own internal affairs.

Since absolute title to lands beneath navigable waters and tidewaters passed to new States upon their admission to the Union, there is no federal question as to "how far the State's sovereign right extends under the Equal-Footing Doctrine." *Bonelli Cattle Co. v. Arizona, supra,* 414 U.S. at 319. The title which vested as an incident of sovereignty was full, complete and absolute. No greater title could have been obtained, and no State could possibly exceed the scope of the title that it already possessed.

The absence of a federal question is further demonstrated by the fact that all questions as to the scope of a State's sovereign title have been exclusively confided to the state courts for determination. In *Fox River Paper Co. v. Railroad Comm'n,* 274 U.S. 651, 655 (1927), this Court stated that ". . . the nature and extent of the rights of the state and riparian owners in navigable waters within the state and the floor beneath are matters of state law to be determined by the statutes and judicial decisions of the state." Numerous decisions of this Court have applied this general rule to a variety of title disputes and have found them all to involve questions of state, and not federal, law. Indeed, in *Iowa v. Rood,* 187 U.S. 87 (1902), this Court expressly held that a State's claim of sovereign title did not raise a federal question conferring appellate jurisdiction upon this Court.

Thus, the state sovereignty created under compulsion of the Equal-Footing Doctrine necessarily includes the right of the State to determine questions of title between itself and riparian owners under its own law and in

its own courts. Ordinarly the decision of the highest court of each State on matters of state law is deemed to be conclusive in this Court. *Bonelli* contravenes this well-established principle. It intrudes the federal common law into an area that has always been regarded as the exclusive province of the States. For this reason, it should be reconsidered before it makes further inroads into the vital balance between state and national sovereignty.

Finally, *Bonelli* should be reconsidered because it does not involve a proper application of the federal common law. While federal law may be needed to protect the federal rights of a grantee holding under a federal patent, federal supervision is not needed to protect the title to those lands whose ownership vested in the States as an incident of sovereignty. As a sovereign, a State has its own courts and its own rules of property to protect its title. While "[i]t is not uncommon for federal courts to fashion federal law when federal rights are involved," *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 457 (1957), the logical converse of this precept is that the federal courts lack the power to fashion federal law when no federal right or interest is involved.

The wholly intrastate title dispute presented here is most assuredly a case lacking any federal interest to justify application of federal common law. If *Bonelli* has expanded federal question jurisdiction for intrastate title disputes, it can only serve to congest already

backlogged federal district courts. The longstanding existence of diverse state rules governing riparian ownership militates against any need for a uniform rule imposed as a matter of federal common law. If state law may properly govern the rights of federal patentees whose property borders on navigable streams, there is little sense in applying federal common law to decide local title questions when neither the State nor the private riparian owner traces its title to a federal grant.

ARGUMENT

ABSENT A CLAIM UNDER A FEDERAL GRANT, A WHOLLY INTRASTATE TITLE DISPUTE BETWEEN A STATE AND A PRIVATE OWNER OF RIPARIAN LAND DOES NOT RAISE A FEDERAL QUESTION ESSENTIAL TO THE APPELLATE JURISDICTION OF THIS COURT

Bonelli Cattle Co. v. Arizona, 414 U.S. 313 (1973), involved a controversy between the State of Arizona and a riparian landowner over title to a portion of the bed of the Colorado River which was exposed when the river waters receded as a result of a federal rechanneling project. This Court held that federal common law, and not Arizona law, governed the resolution of the conflicting claims to the exposed bed of this navigable river.

This choice-of-law result was in no way predicated on the fact that the property in dispute was in close proximity to the interstate boundary between Arizona and Nevada because all of the land exposed by the receding waters of the Colorado River lay between the new riverbed clearly owned to midchannel by the State of Arizona and the old high water mark which was the waterward boundary of the parcel owned by the Bonelli Cattle Company. Nor did this Court's decision turn on the fact that the Bonelli Cattle Company traced its title to a pre-statehood federal patent because the Court expressly declined to rest its choice-of-law result on the scope of the federal patent. *See* 414 U.S. at 321, n. 11. Thus, neither the interstate boundary nor the federal patent in the petitioner's chain of title supplied the Court with a basis for

applying federal common law to the purely intrastate law title question presented by the facts.

Rejecting petitioner Bonelli's claim based on construction of the scope of the federal patent, this Court reformulated the issue in the following words:

> ". . . The very question to be decided is the nature and extent of the title to the bed of a navigable stream held by the State under the equal-footing doctrine and the Submerged Lands Act. In this case, the question of title as between the State and a private landowner necessarily depends on a construction of a 'right asserted under federal law.'" (414 U.S. at 320-21.) (Footnote omitted.)

The opinion explains that it was unnecessary for the Court to decide whether the rights conferred by the pre-statehood federal patent compelled the application of federal law ". . . because the State's claim in this case is premised on a construction of the federal equal-footing doctrine and the congressionally enacted Submerged Lands Act." (*Id.* at 321, n. 11.) Later in the opinion this Court stated that "it is only the State's claim to title under the equal-footing doctrine which required the invocation of federal law to resolve the instant dispute." (*Id.* at 330, n. 27.)

In the present controversy, the Oregon Supreme Court has applied *Bonelli* to deny the State of Oregon title to an intrastate portion of the bed of Willamette River. The *Bonelli* decision is controlling precedent here if, and only if, the controversy there raised a federal question properly invoking the appellate jurisdiction of this Court. Under article III of the United

States Constitution, the appellate jurisdiction of this Court is ". . . capable of embracing every case enumerated in the Constitution which is not exclusively to be decided by way of original jurisdiction." *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 337 (1816). Since *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590 (1874), however, it has been settled that the appellate jurisdiction is limited to the correction of errors relating solely to federal law. In *Murdock*, the Courts stated:

> ". . . the state courts are the appropriate tribunals, as this Court has repeatedly held, for the decision of questions arising under their local law, whether statutory or otherwise." 87 U.S. (20 Wall.) at 626.

It does not appear that any of the parties or *amici* in *Bonelli* challenged the existence of the federal question as formulated by this Court. Since the existence of a federal question is critical to the appellate jurisdiction of this Court, *amici* submit that the point remains open here. When a question of jurisdiction has not been contested in a prior case, the exercise of jurisdiction under these circumstances has not been deemed to be precedent and this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before it. *Hagans v. Lavine*, 415 U.S. 528, 533-35, n. 5 (1974); *United States ex rel. Arant v. Lane*, 245 U.S. 166, 170 (1917); *Louisville Trust Co. v. Knott*, 191 U.S. 225, 236 (1903); *Cross v. Burke*, 146 U.S. 82, 86 (1892); *Snow v. United States*, 118 U.S. 346, 354 (1886); *United States v. More*, 7 U.S. (3 Cranch) 159, 172 (1806).

Even if the question of jurisdiction had been raised and decided in *Bonelli*, *amici* would still urge this Court to reconsider its ruling. Prior to *Bonelli*, this Court had consistently recognized that the States were the absolute owners of the lands beneath their navigable waters and their tidewaters as an incident of sovereignty. Until *Bonelli*, this Court had traditionally respected each State's power to decide under its own law all questions of title to the beds of navigable waters and the lands adjacent thereto when situated wholly within the boundaries of a single state. Since *Bonelli* is so markedly inconsistent with these settled lines of cases, the doctrine of *stare decisis* should not preclude reconsideration of *Bonelli* in this case. As Mr. Justice Frankfurter wrote for the Court:

> "[S]tare decisis is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder and verified by experience." *Helvering v. Hallock*, 309 U.S. 106, 119 (1940).

It is precisely because *Bonelli* stands as such a significant departure from this Court's otherwise consistent recognition of state sovereignty over submerged lands that *Bonelli* should be reconsidered for the virtually identical reasons that prompted reconsideration of a very recent decision in *Boys Markets, Inc. v. Retail Clerks Union*, 398 U.S. 235, 241 (1970).

A. Neither Bonelli nor the Instant Case Raises a Federal Question Arising Under the Equal-Footing Doctrine or the Submerged Lands Act

1. The Historic Role of the Equal-Footing Doctrine Has Been To Delimit the External Scope of State Sovereignty

The term "equal footing" does not appear in the United States Constitution, nor was it employed in the Articles of Confederation. It finds its historical origin in the fact that some of the members of the original Confederation owned land outside their boundaries. *See generally,* Hanna, *Equal Footing in the Admission of States,* 3 Baylor L. Rev. 519, 523 (1951), for history of the Equal-Footing Doctrine. In 1784, Virginia ceded lands northwest of the Ohio River to the Confederation on the condition, among others, that new States should be created and admitted under the Articles of Confederation with the same rights of sovereignty, freedom and independence as the other States. This act of acceptance was superseded by the Northwest Ordinance of 1787, which included the provision that each State was to be admitted into the Congress of the United States on an equal footing with the original States in all respects. After the adoption of the Constitution, the Northwest Ordinance was reenacted in 1789. The expression "equal footing" or its equivalent has been used in the acts of Congress admitting all other new States to the Union, commencing with Tennessee in 1796. *Coyle v. Smith,* 221 U.S. 559, 567 (1911). For a compilation of these Acts, *see* Leighty, *The Source and Scope of Public and*

Private Rights in Navigable Waters, 5 Land & Water L. Rev. 391, 416, n. 4 (1970).

Prior to the *Bonelli* decision, the Equal-Footing Doctrine had never been applied to restrict any state in the conduct of its internal affairs. Rather it served to define the respective boundaries between state and federal sovereignty. In *Coyle v. Smith,* 221 U.S. 559 (1911), the Court employed the Equal-Footing Doctrine to invalidate a provision in the congressional act admitting Oklahoma to the Union that attempted to prohibit the new State from moving its capital to a new location for a given number of years. The Court reasoned that since one of the Original Thirteen States could not be shorn of this power to move its capital by an act of Congress, a newly admitted State could not be so restricted by a provision in a congressional act of admission. The Court stated:

> ". . . [W]hen a new State is admitted into the Union, it is so admitted with all of the powers of sovereignty and jurisdiction which pertain to the original States, and . . . such powers may not be constitutionally diminished, impaired or shorn away by any conditions, compacts or stipulations embraced in the act under which the new State came into the Union, which would not be valid and effectual if the subject of congressional legislation after admission." (221 U.S. at 573.)

Coyle, and the cases that opinion relied upon, established the proposition that the Equal-Footing Doctrine prohibited the federal government from creating new

States that were any less sovereign than those already members of the Union. *Coyle* observed that the power of Congress set forth in article IV, section 3 of the Constitution was to admit "new States into this Union." The Court interpreted this phraseology as follows:

> " 'This Union' was and is a union of States, equal in power, dignity and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself. To maintain otherwise would be to say that the Union, through the power of Congress to admit new States, might come to be a union of States unequal in power, as including States whose powers were restricted only by the Constitution, with others whose powers had been further restricted by an act of Congress accepted as a condition of admission. Thus it would result, first, that the powers of Congress would not be defined by the Constitution alone, but in respect to new States, enlarged or restricted by the conditions imposed upon new States by its own legislation admitting them into the Union; and, second, that such new States might not exercise all of the powers which had not been delegated by the Constitution, but only such as had not been further bargained away as conditions of admission." (221 U.S. at 567.)

The Equal-Footing Doctrine is not only a limitation upon the extent to which the federal government may limit the sovereign powers of newly admitted States, but it also serves to limit State intrusions upon national sovereignty. *United States v. Texas,* 339 U.S. 707 (1950), was such a case. Even though Texas as

an independent republic might have had greater rights prior to admission to the Union, the Court held that Texas after admission had no greater rights in the marginal sea than any other State. The Court observed:

> "The 'equal footing' clause prevents extension of the sovereignty of a State into a domain of political and sovereign power of the United States from which the other States have been excluded, just as it prevents a contraction of sovereignty . . . which would produce inequality among the States." (*Id.* at 719-20.) (Citation omitted.)

Neither *Coyle v. Smith* nor *United States v. Texas* intimates that the Equal-Footing Doctrine in any way limits a State's exercise of sovereignty within its own borders. The teaching of these cases is that the Equal-Footing Doctrine serves only to delimit the peripheries of state and national sovereignty by drawing boundary lines forbidding the intrusion of one into the exclusive province of the other.

Until *Bonelli,* the Equal-Footing Doctrine served only to define these external boundaries. It had never been applied to restrict a single State's exclusive jurisdiction over its own internal affairs. In *Dick v. United States,* 208 U.S. 340, 350 (1908), the Court clearly indicated that the Equal-Footing Doctrine was not a limitation upon a State's internal affairs when it stated:

> ". . . A State upon its admission to the Union, is thereafter upon equal footing with every other State and has full and complete jurisdiction over all persons and things within its limits, except as it may be restrained by provisions of the

Federal Constitution or its own Constitution." *Accord: Parker v. Brown,* 317 U.S. 341, 360 (1943); *Pennoyer v. Neff,* 95 U.S. 714, 722 (1877); *Ohio Life Ins. & Trust Co. v. Debolt,* 57 U.S. (16 How.) 416, 428 (1853); *Rhode Island v. Massachusetts,* 37 U.S. (12 Pet.) 657, 719 (1838).

Such language unmistakably indicates that what federal limitations there are upon the internal sovereignty of a State must be found not in the Equal-Footing Doctrine but in other constitutional limitations.

Insofar as the *Bonelli* decision misconceives the nature of the Equal-Footing Doctrine and applies it to restrict the title of the States as to their sovereign lands, it intrudes the federal common law into an area that has always been regarded as the exclusive province of the States. Such an intrusion is in derogation of the Tenth Amendment to the United States Constitution which provides that: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

2. The Equal-Footing Doctrine Creates Sovereign Title to Submerged Lands but Does Not Restrict the States in Resolving Title Disputes as a Matter of Internal Affairs

In *Bonelli Cattle Co. v. Arizona, supra,* 414 U.S. at 319, this Court stated the federal question to be "not what rights the State accorded private owners in the land which the State holds as sovereign; but, rather, how far the State's sovereign right extends under the equal footing doctrine and the Submerged Lands Act. . . ." Thus, the Court appears to have treated the passage of title from the federal government to

each State admitted to the Union by act of Congress as if it were a federal grant of sovereign land. At one point in the opinion, the Court refers to the vesting of title to sovereign lands at statehood as a "grant to the State." 414 U.S. at 323. One commentator has questioned this use of the term "grant" because it implies a choice on the part of the grantor to convey or not to convey; Congress had no such choice since it was powerless to withhold from new States any aspect of sovereignty held by the Original States. Note, 50 Wash. L. Rev. 777, 786 (1975). By this inapt analogy to a federal grant, the Court was led, *a fortiori,* to the conclusions that a federal question was presented and that federal law governed the scope of the grant.

Of course, the interpretation of the scope of a federal patent is properly the subject of federal law. *Borax Consolidated, Ltd. v. City of Los Angeles,* 296 U.S. 10, 22 (1935). But the vesting of title to sovereign lands in new States upon their admission to the Union cannot be equated to the right of ownership conveyed by a federal grant which is thereafter governed by federal law. The operation of the equal-footing principle has been said to have accorded newly admitted States the same property interests in sovereign lands as were enjoyed by the Thirteen Original States as successors to the British Crown. *Utah v. United States,* 403 U.S. 9, 10 (1971). After the American Revolution, the Original Thirteen Colonies succeeded the Crown and ". . . in that character hold the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the constitution to the general government." *Martin v. Waddell,* 41 U.S. (16 Pet.)

367, 410 (1842). It has been long settled that the shores of navigable waters and the soils under them in the Original States were not granted by the Constitution to the United States, but were reserved to the several States, *Mumford v. Wardwell,* 73 U.S. (6 Wall.) 423, 436 (1867). In the territories acquired by Congress, whether by cession from the original States or by treaty with a foreign country, the United States held title to the lands beneath navigable waters and tidewaters in trust for future States. *Shively v. Bowlby,* 152 U.S. 1, 48-50 (1894). When new states were formed out of the federal territories, they were "admitted into the Union on an equal footing with the Original States. . . ." *Pollard's Lessee v. Hagan,* 44 U.S. (3 How.) 212, 229 (1845).

Under the Equal-Footing Doctrine, title to lands beneath navigable waters and tidewaters passed from the federal government to the new States upon their admission to the Union. *Texas v. Louisiana,* 410 U.S. 702, 710 (1973) (navigable waters); *Weber v. Harbor Comm'rs,* 85 U.S. (18 Wall.) 57, 65-66 (1873) (tidelands). Since the original States had reserved to themselves the absolute ownership of, and dominion and sovereignty over, all lands beneath navigable and tidewaters, States later admitted "have the same rights, sovereignty and jurisdiction in that behalf as the original States possess in their respective borders." *Knight v. United States Land Ass'n,* 142 U.S. 116, 163 (1891). *Accord: United States v. Texas,* 339 U.S. 707, 716-17 (1950); *United States v. Oregon,* 295 U.S. 1, 14 (1935); *United States v. Holt State Bank,* 270 U.S. 49, 54-55 (1926); *Shively v. Bowlby,* 152 U.S. 1, 26, 57-58 (1894); *Hardin v. Jordan,* 140 U.S. 371,

381-82 (1891); *Barney v. Keokuk,* 94 U.S. 324, 338 (1876); *Weber v. Harbor Comm'rs,* 85 U.S. (18 Wall.) 57, 65-66 (1873); *Mumford v. Wardwell,* 73 U.S. (6 Wall.) 423, 436 (1867); *Pollard's Lessee v. Hagan,* 44 U.S. (3 How.) 212, 229 (1845); *Martin v. Waddell,* 41 U.S. (16 Pet.) 367, 410 (1842).

Since full and complete title vested in new States upon their admission to the Union, it is difficult to see how any federal question could arise under the Equal-Footing Doctrine. The title vested as an incident of sovereignty was full, complete and absolute. No greater title could be obtained, and no State could possibly exceed the scope of the title that it already possessed. Therefore when this Court asked in *Bonelli* "how far the State's sovereign rights extends under the equal-footing doctrine" (414 U.S. at 319), there was no federal question because the prior decisions of this Court have already answered it.

Moreover, the absence of a federal question is further demonstrated by the fact that all questions as to the scope of a State's sovereign title have been exclusively confided to the state courts for determination. As a sovereign, the State is not only the owner of the beds of its navigable waters and tidelands but is also vested with the power to formulate and apply its own local rules of property with respect to these lands. The decisions of this Court are replete with statements to that effect.

In *Fox River Paper Co. v. Railroad Comm'n,* 274 U.S. 651, 655 (1927), the Court stated that ". . . the nature and extent of the rights of the state and of riparian owners in navigable waters within the state and the soil beneath are matters of state law to be

determined by the statutes and judicial decision of the state." In *Shively v. Bowlby*, 152 U.S. 1 (1894), the principle that state law governs the adjudication of riparian property rights was necessarily implied from the Equal-Footing Doctrine:

> "[T]he new States admitted into the Union since the adoption of the Constitution have the same rights as the original States in the tidewaters, and in the lands under them, within their respective jurisdictions. The title and rights of riparian or littoral proprietors in the soil below high-water mark, therefore, are governed by the laws of the several States, subject to the rights granted to the United States by the Constitution." (*Id.* at 57-58.)

Although the State is the absolute owner of its submerged lands and tide lands, ". . . it depends on the law of each state as to what waters and what extent this prerogative of the State over the lands under water shall be exercised." *Hardin v. Jordan*, 140 U.S. 371, 382 (1891). State law controls the extent of the fee, whether increased or diminished by the processes of accretion, erosion, reliction or avulsion. When accretion or an avulsive change occurs solely within the boundary of a single State, this Court has applied the following general rule:

> "How the land that emerges on either side of an interstate boundary stream shall be disposed of as between public and private ownership is a matter to be determined according to the law of each State, under the familiar doctrine that it is for the states to establish for themselves such rules of property as they deem expedient with respect to the navigable waters within their borders and the riparian lands adjacent to them." *Arkansas v. Tennessee*, 246 U.S. 158, 175-76 (1918).

The title to land acquired by accretion has long been held to be ". . . a title acquired under operation of the law of the State, which each State determines for itself." *St. Louis v. Rutz*, 138 U.S. 226, 250 (1891); *Barney v. Keokuk*, 94 U.S. 324, 337 (1876).

It would thus appear that the State sovereignty created under compulsion of the Equal-Footing Doctrine necessarily includes the right of the State to determine questions of title between itself and riparian owners under its own law and in its own courts. Ordinarily the decision of the highest court of each State on matters of state law is deemed to be conclusive in this Court. *Huddleston v. Dwyer*, 322 U.S. 232, 237 (1944); *Illinois Central Railroad Co. v. Chicago*, 176 U.S. 646, 659 (1900). In this regard the *Bonelli* contravenes the well-established rule. *Bonelli* should therefore be reconsidered before it has an opportunity to do violence to "the vital principle of federalism that a state court is the final arbiter of state law." *Knapp v. Schweitzer*, 357 U.S. 371, 382 (1958) (separate opinion of Warren, C. J.).

3. This Court Has Expressly Held That a Claim Based on Sovereign Title Does Not Raise a Federal Question

Prior to *Bonelli*, this Court had already concluded that the extent of sovereign title did not raise a federal question concerning appellate jurisdiction upon this Court. Not considered in *Bonelli* was the case of *Iowa v. Rood*, 187 U.S. 87 (1902). This case involved a dispute over the title to 800 acres of land lying on the bed of an inland lake. The State of Iowa intervened in the action and claimed to own the land by virtue of its right of sovereignty over the beds

of all lakes meandered by the general government. The state courts rejected Iowa's claim of sovereign title and quieted title in private claimants.

Upon a writ of error to this Court, Iowa asserted that its claim of sovereign title raised federal questions arising under (1) provisions of the Louisiana Purchase treaty with France; (2) Article IV, section 3, declaring that "new states may be admitted by the Congress into this Union"; and (3) the act of Congress of 1846, admitting the State of Iowa into the Union with the standard equal-footing proviso.

The Court dismissed the writ of error for want of a federal question arising under the treaty, the Constitution or the act of Congress. Relying on Chief Justice Marshall's decision in *City of New Orleans v. DeArmas*, 34 U.S. (9 Pet.) 224 (1835), the Court concluded that the title set up by Iowa did not depend upon a construction of any of these instruments unless it could be shown that its sovereign title was protected by them. 187 U.S. at 91-93. The Court found that both *DeArmas* and *Rood* ". . . involved no principle upon which this court could take jurisdiction which would not apply to all the controversies respecting titles originating before the cession of Louisiana to the United States, and that 'it would also comprehend all controversies concerning titles in any of the new States, since they are admitted into the Union by laws expressed in similar language.'" *Id.* at 93. Thus, *Iowa v. Rood* stands for the proposition that a claim based on sovereign title does not involve a federal question either arising under the equal-footing clause of a congressional Act of Admission or arising under the Constitution or a treaty of cession.

4. The Submerged Lands Act Did Not Convert Purely Local Title Questions Into Questions of Federal Law

As in *Bonelli*, the Submerged Lands Act, 43 U.S.C. § 1301 *et seq.*, does not furnish an independent basis for appellate jurisdiction. "The legislative history of the Act indicates that it was intended to be merely confirmatory of the State's existing rights in the beds of their navigable waterways." 414 U.S. at 324, n. 19.

B. This Case Does Not Properly Arise Under the Federal Common Law

1. In This Case, the Court Is Not Called Upon to Construe the Terms of a Federal Land Grant

Although this Court in *Bonelli* likened the creation of sovereign title upon admission to statehood to a "grant" (414 U.S. at 323), the preceding section of this brief has demonstrated that title to the lands beneath navigable waters vested in the States as an incident of sovereignty and thus gave the States not only complete title to these lands but also the sovereign right to resolve questions affecting them under state law. The theory behind the application of federal common law to resolve questions relating to federal land patents clearly demonstrates how inappropriate it is to apply federal common law to local disputes between a state and riparian owners. In *Borax Consolidated, Ltd. v. Los Angeles*, 296 U.S. 10, 22 (1935), the Court stated:

> ". . . the question as to the extent of [a] federal grant, that is, as to the limit of the land conveyed, or the boundary between the upland and the tideland, is necessarily a federal question. It is a question which concerns the validity and effect

of an act done by the United States; it involves the ascertainment of the essential basis of a right asserted under federal law." (Brackets added.)

The obvious justification of this rule is that federal law is needed to protect the federal rights of the grantee holding under a federal patent. If state rules of construction were applied to the scope of the patent, the grantee might be accorded property rights of less scope than he had been promised by the federal government. The continuing supervision of the federal common law with respect to federal patents is thus protective of a clear federal interest in seeing that federal acts are accorded full force and effect. On the other hand, federal supervision is not needed to protect the title to submerged land which vested in the States as an incident of sovereignty. As a sovereign, a State has its own courts and its own rules of property to protect its title. If the state courts fail to protect the sovereign title vested in the State, the State is free to change its constitution and laws under its own legislative process. The only qualification is that the State's rules must not violate due process or any other federal guarantee protecting private landowners who have conflicting title claims.

2. This Case Does Not Involve Any Other Federal Interest Justifying the Application of Federal Law

When it is recognized that a State does not need the protection of federal common law in the way that a federal grantee does, there no longer exists any federal interest to impel the creation of special federal rules of property for cases like *Bonelli* and

the case at bar. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), established that the federal courts do not possess the power to develop a body of general federal common law. *Erie* did not, however, preclude the development of specialized federal common law in appropriate circumstances. The ability to create and to declare what is the federal law is essential to the effective implementation of federal legislation. Mishkin, *The Variousness of "Federal Law": Competence in Discretion in the Choice of National and State Rules for Decisions*, 105 U. Penn. L. Rev. 797, 799 (1957). Since *Bonelli* and the present case involve no federal statutes, this basis for creating federal common law does not exist.

Federal law must also govern property disputes between the States and the federal government when national sovereignty is at issue. Such a case was *United States v. Maine*, 420 U.S. 515 (1975), where this Court found the United States to have sovereign rights in the seabed and subsoil of the Continental Shelf seaward of the three-mile limit. Likewise, in interstate boundary disputes, this Court must fashion federal common law to govern such controversies. *See e.g., Kansas v. Colorado*, 206 U.S. 46, 98 (1907); *Connecticut v. Massachusetts*, 282 U.S. 660, 669-71 (1931). In such interstate disputes, the application of state law would be unworkable since the absence of a federal rule would leave the Court without any basis for applying one State's law in preference to another's.

None of the foregoing special situations is presented in the instant case which involves a local dispute between the State of Oregon and a sand and gravel

company over title to an intrastate section of the Willamette River. If federal common law governs this dispute, the federal interest must be found elsewhere. In *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 457 (1957), Mr. Justice Douglas wrote for the Court that "It is not uncommon for federal courts to fashion federal law when federal rights are involved." The logical converse of this precept is that the federal courts lack the power to fashion federal law where no federal right or interest is involved. The intrastate title dispute presented here is most assuredly such a case.

In *United States v. Yazell*, 382 U.S. 341, 352 (1966), this Court has said that state rules should be overridden by federal courts applying federal common law "only where clear and substantial interests of the National Government, which cannot be served consistently with respect for such state interests, will suffer major damage if the state law is applied." There is no national interest that requires the protection of a specialized common law rule. At present, "[t]he great body of law in this country which controls acquisition, transmission and transfer of property and defines the rights of its owners in relation to the state or to private parties, is found in the statutes and decisions of the state." *Davies Warehouse Co. v. Bowles*, 321 U.S. 144, 155 (1944). "Even when federal general common law was in its heyday, an exception was carved out for local laws of real property." *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 591 (1973). It would be strange indeed if, in the intervening years since *Erie*, a federal interest in purely local land title disputes had emerged in a field

which even the strongest proponents of a general federal common law had left exclusively to the States.

Not only is there no federal interest to be protected by formulating federal common law rules for intrastate title disputes, but the application of such rules could be cruelly antithetical to very important federal interests. Congestion in the lower federal courts is a problem of national concern. *See, e.g.*, Burger, *Yearend Report*, 62 A.B.A.J. 189 (Feb. 1976); H. Friendly, *Federal Jurisdiction: A General View*, 19-54 (1973). Proposals have been put forward to abolish three-judge courts and to curtail diversity jurisdiction in order to alleviate the problem to some degree. It will be anomalous to cut back jurisdiction in these areas and to expand it simultaneously by making federal cases out of title disputes that more properly should be the exclusive concern of state courts. In *Illinois v. City of Milwaukee*, 406 U.S. 91, 98-101 (1972), this Court clearly established that cases arising under the federal common law are actions arising under the "laws" of the United States within the meaning of 28 U.S.C. § 1331(a). This holding means that all cases arising under any federal common law rules that may have been created pursuant to *Bonelli Cattle Co. v. Arizona, supra*, would be cases within the original jurisdiction of the federal district courts. Even if they are filed in state court, the defendants may have the right to remove them to federal court under the general removal statute because they could have been brought there in the first instance. 28 U.S.C. § 1441.

The ultimate scope of the new federal question jurisdiction which may have been created by *Bonelli* is potentially enormous. It has a finite limit when

one realizes that there are only 69,614 square miles of inland waterways and 66,769 miles of tidal shoreline which can give rise to litigation. But the lands involved are always changing due to the natural processes of accretion, erosion, and reliction. In addition, every year the spring rains bring floods causing changes in the courses of rivers. Reclamation, dredging and flood control projects all produce title changes. Once these cases give rise to litigation, the proceedings are usually time-consuming and complex. Adding to the burden of the federal courts is the fact that these cases in no way call upon the special expertise of federal judges in deciding questions of federal right. Absent any identifiable federal interest in fashioning federal common law to govern intrastate title controversies, the additional burden created for the federal courts should weight the scales against finding federal questions in this area where, prior to *Bonelli,* there once were none.

Another reason militating against the application of federal common law to cases like the one at bar is that there is no need for a uniform federal rule. The desirability of a federal rule may be plain in cases such as *Clearfield Trust Co. v. United States,* 318 U.S. 363, 367 (1943), where the application of state law: ". . . would subject the rights and duties of the United States to exceptional uncertainty" and "would lead to great diversity in results by making identical transactions subject to the vagaries of the laws of the several states." Just the contrary is true in this case. All of the diverse state rules governing riparian

ownership may have to yield to this Court's view of the federal common law. For nearly two centuries, the States have been permitted to formulate a diversity of rules governing disputes as to the ownership of submerged lands and riparian properties. The variety of these different rules strongly suggests that unlike *Clearfield Trust,* the desirability of a uniform rule is not plain.

Throughout the history of the Union until *Bonelli* each State considered itself free to determine boundary and title disputes in and along its navigable waters. For that reason, each State has developed its own body of law governing navigable waters and conflicting rules arose in the various States. Different rules were established in determining the extent of a riparian owner's title. Some States held title extended only to the high water mark. *Mather v. State,* 200 N.W.2d 498 (Iowa, 1972). Other States held that title extended to the low water mark. *Cooly v. Golden,* 117 Mo. 33, 235 N.W. 100 (1892). Yet others held that title extended to the middle of a river. *Richardson v. Sims,* 118 Miss. 728, 80 So. 4 (1918). States have also differed in their disposition of land which is first totally submerged and then restored. Some States hold title vests in the new riparian. *Wemmer v. Young,* 167 Neb. 495, 93 N.W.2d 837, 848 (1958). Other States hold that title vests in the original riparian. *Perry v. Erling,* 132 N.W.2d 889, 897 (1965). While most States have held that artificially induced accretion inures to the benefit of the upland owner [*see* discussion in *State v. Sause,* 217 Or. 52, 342 P.2d 803, 821-

26 (1959)], the rule in other States is that title to such land is in the State. *United States v. Harrison County,* 399 F.2d 485, 491 (5th Cir. 1968, applying Mississippi Law), and *Carpenter v. City of Santa Monica,* 63 Cal.App.2d 772, 147 P.2d 964 (1944). These diverse state rules of property may have to yield if *Bonelli* were given the expansive interpretation that federal common law governs the respective rights of the States and the upland owner.

In view of the varying rules from State to State and the length of time over which this diversity has been tolerated, *amici* submit that this Court would have to find a federal interest of exceedingly great importance to justify displacement of all of these different State rules by a Procrustean federal common law approach. Such an approach is inconsistent with the general federal rule that whatever incidents or rights attached to the ownership of property conveyed by the federal government in its patents will be determined according to state law. *See, e.g., Packer v. Bird,* 137 U.S. 661, 669 (1891). If state law may properly govern the rights of federal patentees whose property borders on navigable streams, there is little sense in applying federal common law rules to decide local title questions where neither the State nor the private riparian owner traces its title to a federal grant.

Conclusion

Since the Equal-Footing Doctrine has no proper application to intrastate title and boundary disputes, *Bonelli Cattle Co. v. Arizona,* 414 U.S. 313 (1973), cannot be considered controlling precedent in this case. It was decided in the absence of a viable federal question conferring appellate jurisdiction on this Court. Intrastate

title disputes, such as those involved in *Bonelli* and the present case, are matters of local concern. Absent any overriding federal interests, they should be finally decided in the state courts under state law. Therefore, *amici* urge this Court to reconsider *Bonelli Cattle Co. v. Arizona* and to return this case to the Oregon Supreme Court relieved of that precedent for a new decision under Oregon law.

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